No. 18-266

IN THE

Supreme Court of the United States

THE DUTRA GROUP,

Petitioner,

v.

CHRISTOPHER BATTERTON,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

BARRY W. PONTICELLO
RENEE C. ST. CLAIR
ENGLAND, PONTICELLO & ST. CLAIR
701 B. Street Suite 1790
San Diego, CA 92101
(619) 225-6450
bponticello@eps-law.com

SETH P. WAXMAN
Counsel of Record
PAUL R. Q. WOLFSON
DAVID M. LEHN
CHRISTOPHER ASTA
EDWARD WILLIAMS
DREW VAN DENOVER*
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
seth.waxman@wilmerhale.com

QUESTION PRESENTED

Whether punitive damages may be awarded to a Jones Act seaman in a personal injury suit alleging a breach of the general maritime duty to provide a seaworthy vessel.

CORPORATE DISCLOSURE STATEMENT

The Dutra Group is not aware of any parent corporation or any publicly held company that owns 10% or more of its stock.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 880 F.3d 1089. The order of the district court denying petitioner's motion to strike or dismiss respondent's claim for punitive damages (Pet. App. 17a-21a) is available at 2014 WL 12538172.

JURISDICTION

The court of appeals entered judgment on January 23, 2018. Pet. App. 1a. A petition for rehearing was denied on May 2, 2018. Pet. App. 23a. The petition for a writ of certiorari was filed on August 30, 2018, and was granted on December 7, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT

A. The Evolution Of The Duty Of Seaworthiness

1. General maritime law recognizes that owners and operators of vessels have a duty to ensure that their vessel is seaworthy—that is, fit for its intended voyage. The nature and enforcement of that duty have changed significantly over time, however, and the version of the duty invoked by respondent—a strict-liability duty enforceable in tort suits to recover damages for personal injuries—has existed only since the 1940s. *See Miles* v. *Apex Marine Corp.*, 498 U.S. 19, 25-26 (1990).

Initially, federal judicial decisions and statutes conceived of the duty of seaworthiness as governing only the contractual relationship between seamen and the owners and operators of vessels. If crewmembers proved that a ship was unseaworthy, they had a right to have the ship repaired or to be excused from their employment contract, and to receive lost wages. *See, e.g.*, *Dixon* v. *The Cyrus*, 7 F. Cas. 755 (D. Pa. 1789) (No. 3,930); *The Moslem*, 17 F. Cas. 894 (S.D.N.Y. 1846) (No. 9,875); 1 Stat. 131, § 3 (1790); 5 Stat. 394, 396 ¶¶12, 14 (1840). *See generally Mitchell* v. *Trawler Racer, Inc.*, 362 U.S. 539, 544 (1960); Chamlee, *The Absolute Warranty of Seaworthiness: A History and Comparative Study*, 24 Mercer L. Rev. 519, 530-531 (1973).

During the 1800s, American courts imported a second conception of seaworthiness from Europe: an implied warranty running from the vessel's owner or operator to the merchant or shipper. *Mitchell*, 362 U.S. at 544; Chamlee, 24 Mercer L. Rev. at 521-523. Under that version of the duty, a vessel owner or operator had to compensate the merchant or shipper if its freight

was lost or damaged because of the ship's unseaworthiness. Chamlee, 24 Mercer L. Rev. at 522-524; *see, e.g.*, *Putnam* v. *Wood*, 3 Mass. 481, 484 (1807); *Work* v. *Leathers*, 97 U.S. 379 (1878); *The Caledonia*, 157 U.S. 124, 134 (1895). Asserting its "superior authority in [maritime] matters," *Miles*, 498 U.S. at 27, Congress substantially reduced the scope of that warranty. *See* 27 Stat. 145 (1893); *May* v. *Hamburg-Amerikanische Packetfahrt Aktiengesellschaft*, 290 U.S. 333 (1933).

Under general maritime law as it existed through the 1800s, a seaman injured during employment could recover only under a doctrine known as "maintenance and cure." Under that doctrine, vessel owners and operators are obligated to provide wages, food, lodging, and medical treatment to a seaman while he is wounded or ill in the service of the vessel for as long as the voyage continues, whether or not the vessel owner or operator caused the injury or illness. *See Mitchell*, 362 U.S. at 543; *Atlantic Sounding Co.* v. *Townsend*, 557 U.S. 404, 407-408, 413, 422 (2009); *Harden* v. *Gordon*, 11 F. Cas. 480, 482-483 (D. Me. 1823) (No. 6,047).

"Not until the late nineteenth century did ... it bec[o]me generally accepted that a shipowner was liable [for compensatory damages] to a mariner injured in the service of a ship" where "the owner's failure to exercise due diligence ... render[ed] the ship or her appliances unseaworthy." *Mitchell*, 362 U.S. at 544-545; *see* Chamlee, 24 Mercer L. Rev. at 529. In 1883, a federal court—perhaps for the first time—noted the question whether a shipowner "might be liable in damages [to an injured seaman] ... for [the ship's] unseaworthy condition when sent out of port." *The City of Alexandria*, 17 F. 390, 392-393 (S.D.N.Y. 1883). That court declined to resolve the legal question, however, because it found the ship was seaworthy. *Id.*

This Court arguably recognized unseaworthiness as a basis for personal-injury damages in 1903, when it remarked in *dicta* that "the vessel and her owner are ... liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship." *The Osceola*, 189 U.S. 158, 175 (1903);[1] *see Mahnich* v. *Southern S.S. Co.*, 321 U.S. 96, 99 (1944) ("The [personal-injury] rule seems to have been derived from the seaman's privilege to abandon a ship improperly fitted out ...."); *The Arizona* v. *Anelich*, 298 U.S. 110, 121 n.2 (1936).

For many years, however, the possibility that a seaman might recover damages as compensation for injuries sustained aboard a vessel was highly uncertain. That was so for several reasons. First, an injured seaman could not recover if the vessel's unseaworthiness was caused by the negligence of the crew, under the fellow-servant rule recognized in admiralty. *See Plamals* v. *The Pinar Del Rio*, 277 U.S. 151, 155 (1928); *The Osceola*, 189 U.S. at 175; *The Sachem*, 42 F. 66 (E.D.N.Y. 1890). Second, a seaman could not bring a claim based on negligence generally; to succeed, the claim had to tie the injury to "the unseaworthiness of the ship and her appliances." *The Osceola*, 189 U.S. at 173-175; *see The City of Alexandria*, 17 F. at 392. Fi-

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[1] As this Court and learned commentators noted, the precise meaning of this language in *The Osceola* has long been unclear. *See Mitchell*, 362 U.S. at 546 (Court may have intended "not to broaden the shipowner's liability, but, rather, to limit liability for negligence to those situations where his negligence resulted in the vessel's unseaworthiness"); Gilmore & Black, *The Law of Admiralty* 277 (2d ed. 1975) ("[N]either the facts of the case nor the questions certified required Justice Brown to analyze with care the owner's duty to provide a seaworthy ship").

nally, maritime law did not recognize a cause of action for the wrongful death of a seaman at all. *See The Harrisburg*, 119 U.S. 199, 213-214 (1886).

2. In 1920, Congress acted to ensure a right of recovery for maritime injuries resulting in a seaman's injury or death. The Merchant Marine Act, or the Jones Act as it is typically called, "provides an action in negligence for the death or injury of a seaman." *Miles*, 498 U.S. at 29; *see* 46 U.S.C. § 30104. "[W]ith the passage of the Jones Act ..., Congress effectively obliterated all distinctions between the kinds of negligence for which the shipowner is liable, as well as limitations imposed by the fellow-servant doctrine, by extending to seamen the remedies made available to railroad workers under the Federal Employers' Liability Act" (FELA). *Mitchell*, 362 U.S. at 546-547; *see* 46 U.S.C. § 30104 ("Laws of the United States regulating recovery for personal injury to, or death of, a railway employee apply to an action under this section."). Because Congress intended the Jones Act to "establish[] a uniform system of seamen's tort law parallel to that available to employees of interstate railway carriers under FELA," Congress "[i]ncorporat[ed] FELA unaltered into the Jones Act," including "[FELA's] substantive recovery provisions" and the judicial "gloss[es]" on those provisions. *Miles*, 498 U.S. at 23, 29, 32.

Congress conceived of the Jones Act remedy as an alternative to the seaman's much less certain cause of action for injuries based on unseaworthiness. A few years after the Jones Act's enactment, this Court explained the Jones Act's relationship to unseaworthiness: "The right to recover compensatory damages under the new rule for injuries caused by negligence"—that is, under the Jones Act—"is ... an alternative of the right to recover indemnity under the old rules on

the ground that the injuries were occasioned by unseaworthiness." *Pacific Steamship Co.* v. *Peterson*, 278 U.S. 130, 138 (1928). "[W]hether or not the seaman's injuries were occasioned by the unseaworthiness of the vessel or by the negligence of the master or members of the crew, or both combined, there is but a single wrongful invasion of his primary right of bodily safety and but a single legal wrong, for which he is entitled to but one indemnity by way of compensatory damages." *Id.* (citation omitted).[2]

For the next several decades, the tort of unseaworthiness remained "obscure and relatively little used." *Miles*, 498 U.S. at 25 (quotation marks omitted); *see* Gilmore & Black, *The Law of Admiralty* 383 (2d ed. 1975). Negligence actions under the Jones Act were more attractive to plaintiffs for several reasons. Unseaworthiness "embrace[d] certain species of negligence," but the Jones Act "included several additional species not embraced in" unseaworthiness; Jones Act negligence imposed a general duty of care rather than a narrow duty of due care in providing a seaworthy vessel. *See Peterson*, 278 U.S. at 138. In addition, unlike in unseaworthiness actions, the fellow-servant rule was not a defense under the Jones Act. *See Mahnich*, 321 U.S. at 99. And the Jones Act allowed wrongful-death actions (in addition to personal-injury actions), whereas a wrongful-death action could not be based on unsea-

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[2] The Court later disapproved the "suggestion[]" in some cases that a seaman had to "exercise an election between his remedies for negligence under the Jones Act and for unseaworthiness," but reiterated that unseaworthiness and Jones Act negligence are "alternative 'grounds' of recovery for a single cause of action" and therefore "must [be asserted] in a single proceeding." *McAllister* v. *Magnolia Petroleum Co.*, 357 U.S. 221, 222 n.2, 224-225 (1958).

worthiness under general maritime law. *See Miles*, 498 U.S. at 23-24, 27.

3. The theory of unseaworthiness as a basis for damages liability underwent a "revolution" starting in 1944, when "this Court transformed the warranty of seaworthiness into a strict liability obligation." *Miles*, 498 U.S. at 25; *see Mahnich*, 321 U.S. at 100. "The shipowner became liable for failure to supply a safe ship irrespective of fault and irrespective of the intervening negligence of crew members." *Miles*, 498 U.S. at 25; *see Mahnich*, 321 U.S. at 100; *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85, 94-95 (1946). In ruling that the fellow-servant rule should not be recognized in a general maritime claim based on unseaworthiness, the Court in *Mahnich* noted the need to align unseaworthiness doctrine with the principles established by Congress in the Jones Act: "It would be an anomaly if the fellow servant rule, discredited by the Jones Act as a defense in suits for negligence, were to be resuscitated and extended to suits founded on the warranty of seaworthiness." 321 U.S. at 102-103.

The Court completed the revolution when it held in *Miles* that an action for the wrongful death of a seaman could be premised on a claim of unseaworthiness. 498 U.S. at 27-30. In *Moragne* v. *States Marine Lines, Inc.*, the Court had already overruled *The Harrisburg*, which had refused to recognize a cause of action for wrongful death under general maritime law. 398 U.S. 375, 399-402 (1970). *Miles* "ma[d]e explicit" that *Moragne*'s holding was not "limit[ed] ... to its facts," which had involved "the situation of longshoremen." *Miles*, 498 U.S. at 27, 30.

Driving the Court's decision in *Miles* was the need to promote coherence between the judicially fashioned

doctrine of unseaworthiness and Congress's legislatively expressed policy decisions in the Jones Act and the Death on the High Seas Act (DOHSA), which had approved the creation of a cause of action for wrongful death occurring in international waters. "Admiralty is not created in a vacuum," 498 U.S. at 24, and now that Congress has "legislated extensively" in maritime areas, "an admiralty court should look primarily to these legislative enactments for policy guidance." *Id.* at 27.

The "legislative judgment behind" the Jones Act and DOHSA, the Court concluded, "created a strong presumption in favor of a general maritime wrongful death action." *Miles*, 498 U.S. at 24. Recognition of wrongful-death actions for unseaworthiness "was not only consistent with the general policy of both 1920 Acts favoring wrongful-death recovery, but also effectuated the constitutionally based principle that federal admiralty law should be a system of law coextensive with, and operating uniformly in, the whole country." *Id.* at 27 (quotation marks omitted).

B. The Scope Of Recovery In Actions Under General Maritime Law

Separate from the recognition of a cause of action under general maritime law is the question of "the scope of the damages recoverable" under that cause of action. *Miles*, 498 U.S. at 30. As to that question, too, the Court has stressed the need to align the judicially developed cause of action for unseaworthiness with the legislative policy judgments reflected in the Jones Act.

1. In *Miles*, after the Court concluded that a wrongful-death action could be brought based on unseaworthiness, it turned to the question whether a plaintiff in such an action could recover for "loss of soci-

ety," and whether a plaintiff in a general maritime survivorship action could recover for "the seaman's lost future earnings." 498 U.S. at 21, 30-36. As it had when it considered whether to recognize a wrongful-death action at all, the Court looked to the Jones Act and FELA for direction on that question.

Starting with lost society, the Court noted that FELA's wrongful-death provision did not permit recovery for non-pecuniary loss. By "[i]ncorporating FELA unaltered into the Jones Act," the Court explained, Congress similarly "limit[ed] recovery [in a parallel Jones Act action] to pecuniary loss." *Miles*, 498 U.S. at 32. Because loss-of-society damages compensate for non-pecuniary loss, they cannot be recovered in wrongful-death actions under the Jones Act. *Id.* at 32. Consequently, the Court held that "the Jones Act ... precludes recovery for loss of society" in actions based on unseaworthiness. *Id.*

Turning next to damages for lost future earnings in a survival action, the Court applied a similar analysis. The Court observed that the Jones Act's "survival provision limits recovery to losses suffered during the decedent's lifetime" because it was already established when the Jones Act was enacted that FELA's survival provision contained such a limitation. *Miles*, 498 U.S. at 36. "The Jones Act/FELA survival provision," therefore, "forecloses" lost future income for any survival actions based on unseaworthiness. *Id.* at 36-37.

The Court explained that when "Congress has spoken directly to the question of recoverable damages" in admiralty, "the courts are not free to 'supplement' Congress' answer so thoroughly that the Act becomes meaningless." *Miles*, 498 U.S. at 31 (quotation marks omitted). A decision by Congress to restrict the scope

of recovery in Jones Act negligence cases must therefore "foreclose[] more expansive remedies in a general maritime action founded on strict liability," *i.e.*, unseaworthiness. *Id.* at 36. The Court acknowledged that admiralty courts have traditionally shown "special solicitude for the welfare of seamen and their families." *Id.* But, the Court stressed: "We sail in occupied waters. Maritime tort law is now dominated by federal statute, and we are not free to expand remedies at will simply because it might work to the benefit of seamen and those dependent upon them." *Id.* On the contrary, the Court explained, "[i]t would be inconsistent with our place in the constitutional scheme, were we to sanction more expansive remedies in a judicially created cause of action in which liability is without fault than Congress has allowed in cases of death resulting from negligence" under the Jones Act. *Id.* at 32-33; *see also id.* at 37.

2. In *Atlantic Sounding Co.* v. *Townsend*, the Court considered a different question: "whether an injured seaman may recover punitive damages for his employer's willful failure to pay maintenance and cure." 557 U.S. at 407. Unlike the duty to provide a seaworthy vessel—which, as explained above, developed into a strict-liability tort action only 75 years ago and which has long been viewed as a twin of Jones Act negligence—"the legal obligation to provide maintenance and cure dates back centuries" and is "separate" from Jones Act negligence. *Id.* at 413, 415; *see also Calmar S.S. Corp.* v. *Taylor*, 303 U.S. 525, 527 (1938) (duty of maintenance and cure is "ancient").

The Court began with the premise that "the common-law tradition of punitive damages extends to maritime claims." *Townsend*, 557 U.S. at 414. Next, the Court found "no evidence that claims for maintenance

and cure were excluded from this general admiralty rule." *Id.* at 414-415. Thus, the key question was whether "Congress has enacted legislation departing from this common-law understanding." *Id.* at 415. The only statutory candidate was the Jones Act, and the Court concluded that that the Jones Act "did not eliminate pre-existing remedies available to seamen for the separate common-law cause of action based on a seaman's right to maintenance and cure." *Id.* at 415-416.

The Court also rejected the defendant's argument that "the availability of punitive damages [for maintenance and cure] is controlled by the Jones Act because of this Court's decision in *Miles*." *Townsend*, 557 U.S. at 418. Although the Court emphasized that "[t]he reasoning of *Miles* remains sound," it explained that *Miles* had "not address[ed] either maintenance and cure actions in general or the availability of punitive damages for such actions." *Id.* at 418-421. It was "possible to adhere to the traditional understanding of maritime actions and remedies without abridging or violating the Jones Act," the Court said, because "[u]nlike the situation presented in *Miles*, both the general maritime cause of action (maintenance and cure) and the remedy (punitive damages) were well established before the passage of the Jones Act." *Id.* at 420-421. And unlike unseaworthiness, maintenance and cure "is 'in no sense inconsistent with, or an alternative of, the right to recover compensatory damages under' the Jones Act." *Id.* at 424 (alterations omitted) (quoting *Peterson*, 278 U.S. at 139). "[T]he seaman may have maintenance and cure and also one of the other two," *i.e.*, Jones Act negligence or unseaworthiness. *Id.* (quotation marks omitted).

C. The Proceedings Below

Petitioner provides dredging services and marine construction services and materials. Respondent alleges that while working for petitioner aboard a dredging vessel in August 2014, he was injured when a hatch cover blew open. Pet. App. 17a-18a.

Respondent sued in the Central District of California, asserting three claims: negligence under the Jones Act, breach of the duty of seaworthiness, and breach of the duty of maintenance and cure. Pet. App. 2a-3a, 18a. He sought compensatory damages on all his claims, but sought punitive damages only on his unseaworthiness claim. First Am. Compl. (ECF No. 11) ¶17, Prayer for relief.

Petitioner moved to strike or dismiss respondent's punitive damages claim on the ground that punitive damages are not available in unseaworthiness actions. The district court denied that motion but certified the issue for interlocutory appeal under 28 U.S.C. § 1292(b). Pet. App. 21a, 32a.

The Ninth Circuit affirmed, and held that punitive damages are "awardable to seamen for their own injuries in general maritime unseaworthiness actions." Pet. App. 15a. The court followed circuit precedent on that point, which, it concluded, had not been overruled by *Miles*. Indeed, the court of appeals believed that this case was closer to *Townsend* than to *Miles*. According to the court, in *Townsend* this Court had determined that punitive damages are broadly available under general maritime law, Pet. App. 4a-5a, 14a, whereas *Miles* "did not address punitive damages," Pet. App. 10a, 13a.

The court acknowledged that *Townsend* "leaves room for a distinction between maintenance and cure claims and unseaworthiness claims." Pet. App. 5a. But the court nonetheless found no useful guidance in *Miles*, even though that decision had directly addressed unseaworthiness claims. Despite the extensive discussion in *Miles* about the need to conform remedies under the judge-made unseaworthiness action to those available under the Jones Act, *see* 498 U.S. at 32-33, the court of appeals read *Miles* to concern only the narrow question whether compensatory damages for unseaworthiness are limited to pecuniary loss. Pet. App. 12a-15a. And the court found it "not apparent why barring damages for loss of society should also bar punitive damages." Pet. App. 13a. Because punitive damages "are not compensation for loss at all," the court concluded that *Miles* did not inform the question in this case, and it affirmed the denial of petitioner's motion to strike the claim for punitive damages. Pet. App. 14a-15a.

SUMMARY OF ARGUMENT

Punitive damages are not available in claims for unseaworthiness brought under general maritime law. Congress has exercised its superior constitutional authority to regulate maritime activity by enacting the Jones Act, which provides a cause of action if a seaman is injured or killed by the employer's negligence. As the Court made clear in *Miles* v. *Apex Marine, Inc.*, 498 U.S. 19 (1990), and other cases, due respect for the constitutional separation of powers compels the courts to heed any limitations Congress set on Jones Act negligence actions when they exercise their admiralty powers to fashion remedies for the closely related action of unseaworthiness under general maritime law. Moreo-

ver, the Constitution compels the courts to maintain the uniformity of maritime law. In *Miles*, these constitutional imperatives led the Court to conclude that the Jones Act's bar on non-pecuniary damages in negligence actions applied equally in unseaworthiness actions. Here, the same principles dictate that the Jones Act's bar on punitive damages also bar punitive damages in unseaworthiness actions. As was the case in *Miles*, to hold otherwise would allow the general maritime law developed by the courts to supersede the legislative judgments of Congress.

This Court's more recent decision in *Townsend* does not change the applicability of *Miles* to this case or the outcome that *Miles* compels. By its own terms, *Townsend* applies to maintenance and cure actions, not unseaworthiness actions, and *Townsend* affirms that the rule established in *Miles* continues to be good law. *Townsend* rightly recognized that *Miles*'s different approach was appropriate for unseaworthiness actions: unseaworthiness as it exists today is an alternative of Jones Act negligence that was judicially created after the Jones Act's enactment, whereas maintenance and cure is a separate and ancient doctrine. Thus, judicial expansion of the remedies in maintenance and cure beyond those provided in the Jones Act does not implicate the constitutional imperatives that drove the Court's analysis in *Miles* nearly as much as does judicial expansion of the remedies in unseaworthiness actions.

Furthermore, there is no sound basis for limiting the *Miles* framework only to wrongful-death claims or to the question of whether non-pecuniary damages are available. *Miles*'s reasoning has equal force with respect to personal-injury claims and other types of damages, including punitive damages. Under *Miles*, the scope of recovery in unseaworthiness actions must

yield to Congress's superior judgments regarding the limitations on recovery under the Jones Act, whether the seaman was injured or killed.

But even if this Court were not compelled by its precedent to hold that punitive damages are not available in unseaworthiness actions, such a rule would still be the appropriate course of action. Unlike maintenance and cure actions, there is no history of punitive damages being available in unseaworthiness actions. Allowing recovery of punitive damages in unseaworthiness actions would also have significant adverse consequences on the maritime industry.

ARGUMENT

I. THE IMPERATIVES OF DEFERENCE TO CONGRESSIONAL JUDGMENT AND UNIFORMITY IN MARITIME LAW PRECLUDE PUNITIVE DAMAGES IN UNSEAWORTHINESS ACTIONS

A. Congress's Decision To Bar Punitive Damages In Jones Act Negligence Actions Bars Such Damages In Unseaworthiness Actions Brought By Seamen

As was true in *Miles* v. *Apex Marine Corp.*, the Court here "sail[s] in occupied waters." 498 U.S. 19, 38 (1990). The Jones Act expresses Congress's decision that seamen injured aboard a vessel may recover damages to compensate for their loss, but not punitive damages. Time and again, the Court has emphasized the need to defer to congressional judgments of that sort in admiralty cases, because of the importance of respect to legislative policy judgments and the need for uniformity in maritime liability rules. Those considerations point decisively toward the answer to the ques-

tion presented in this case: Punitive damages are not available in unseaworthiness actions brought by Jones Act seamen.

Miles instructs that any "limits" Congress has placed on the scope of recovery in negligence actions under the Jones Act "foreclose[] more expansive remedies in a general maritime action founded on strict liability," *i.e.*, unseaworthiness. 498 U.S. at 36. That rule follows from dual constitutional imperatives: the separation of powers and the uniformity of maritime law. First, "Congress retains superior authority in [maritime] matters." *Id.* at 27. Therefore, "[i]t would be inconsistent with [the Court's] place in the constitutional scheme were [it] to sanction more expansive remedies in a judicially created cause of action in which liability is without fault"—that is, unseaworthiness as it exists after its 1944 revolution—"than Congress has allowed" for negligence actions under the Jones Act. *Id.* at 32. Second, the Constitution "mandate[s]" that there be "uniform rule[s] applicable to all actions" for a given injury, "whether under ... the Jones Act[] or general maritime law." *Id.* at 27, 33; *see also Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618, 624-625 (1978) (in an unseaworthiness case, stressing need to defer to Congress's judgment in DOHSA that damages for loss of society should not be recoverable); *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375, 393-397 (1970) (looking to Jones Act and DOHSA for guidance whether wrongful-death claim should be available on unseaworthiness theory); *cf. McAllister* v. *Magnolia Petroleum Co.*, 357 U.S. 221, 224-226 (1958) (courts "cannot apply" to unseaworthiness actions "a shorter period of limitations than Congress has prescribed for" Jones Act negligence).

Straightforward application of these principles leads to the conclusion that punitive damages are not available in this case. In the Jones Act, Congress did not allow the recovery of punitive damages in negligence actions. The Jones Act therefore "precludes" recovery of punitive damages in unseaworthiness actions as well. *Miles*, 498 U.S. at 32.

1. There can be no serious dispute that punitive damages are not available in a Jones Act negligence case, whether for personal injuries or for death.[3]

As *Miles* noted, Congress "[i]ncorporat[ed] FELA unaltered into the Jones Act." 498 U.S. at 32; *see* 46 U.S.C. § 30104 ("Laws of the United States regulating recovery for personal injury to, or death of, a railway employee apply to an action under this section."). Specifically, the Jones Act incorporated "the substantive recovery provisions of the older FELA" and existing "gloss[es]" that this Court had rendered on those provisions. *Miles*, 498 U.S. at 32.

"It has been the unanimous judgment of the courts"—including this Court—"since before the enactment of the Jones Act that punitive damages are not recoverable under the Federal Employers' Liability Act." *Miller* v. *American President Lines, Ltd.*, 989 F.2d 1450, 1457 (6th Cir. 1993). By 1920, when the Jones Act was enacted, this Court had established that the purpose of FELA is compensatory. *See, e.g., St. Louis, I.M. & S.R. Co.* v. *Craft*, 237 U.S. 648, 657-658 (1915) (recovery under FELA is "confined to ... loss

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[3] Indeed, petitioner did not even request punitive damages for the Jones Act negligence claim in his complaint—suggesting he recognizes that they are not available for that claim.

and suffering").[4] Because punitive damages are, by definition, not compensatory of loss, punitive damages are not available in actions under FELA.[5]

This Court has never suggested that punitive damages are available under FELA. On the contrary, the Court recognized that punitive damages are not available in a pre-Jones Act case, *Seaboard Air Line Railway* v. *Koennecke*, 239 U.S. 352 (1915). Reviewing a wrongful-death complaint brought by heirs of a railroad worker that was ambiguous as to the source of the cause of action, the Court observed that "[i]f [the complaint] were read as manifestly demanding exemplary damages" (*i.e.*, punitive damages), "that would point to the state law" rather than FELA as the basis for the claim. *Id.* at 354; *see also Atlantic Sounding Co.* v. *Townsend*, 557 U.S. 404, 427-428 (2009) (Alito, J., dissenting). Since enactment of the Jones Act, courts have

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[4] *See also Michigan Cent. R.R. Co.* v. *Vreeland*, 227 U.S. 59, 65, 69-71 (1913) (FELA provides right to "recover[] such damages as would ... compensate[]" for loss); *Gulf, Colo., & Santa Fe Ry. Co.* v. *McGinnis*, 228 U.S. 173, 175 (1913) (recovery under FELA "must ... be limited to compensating those ... as are shown to have sustained some pecuniary loss"); *American R.R. Co. of Porto Rico* v. *Didricksen*, 227 U.S. 145, 149 (1913) ("The damage [under FELA] is limited strictly to the financial loss thus sustained").

[5] *See, e.g., Restatement (Second) of Torts* § 908 (1979) ("Punitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future."); *Lake Shore & M.S. Ry. Co.* v. *Prentice*, 147 U.S. 101, 107 (1893) ("Exemplary or punitive damages [are] awarded, not by way of compensation to the sufferer, but by way of punishment of the offender, and as a warning to others ....").

continued to conclude that punitive damages are not permitted under FELA.[6]

This "well established" pre-Jones Act "gloss on FELA"—that compensatory damages are available but punitive damages are not—was incorporated into the Jones Act. *Miles*, 498 U.S. at 32. In fact, the scope of recovery under FELA and thus under the Jones Act does not even include all compensatory damages, as this Court held in *Miles*. *See id.* at 31-32 (plaintiff could not recover non-pecuniary damages in a wrongful-death action). But for present purposes, the salient fact is that *only* compensatory damages may be obtained under the Jones Act. Therefore, as lower courts have uniformly held, "[p]unitive damages are not ... recoverable under the Jones Act." *Miller*, 989 F.2d at 1457; *see, e.g.*, *McBride* v. *Estis Well Serv., L.L.C.*, 768 F.3d 382, 388 (5th Cir. 2014) (en banc) ("no cases have awarded punitive damages under the Jones Act"); *Kopczynski* v. *The Jacqueline*, 742 F.2d 555, 560-561 (9th Cir. 1984) (punitive damages "may not be awarded on a claim of negligence based on the Jones Act"); *see also Townsend*, 557 U.S. at 428 (Alito, J., dissenting).

2. It follows under *Miles* that punitive damages are not available in unseaworthiness actions, either. Just a few years after the Jones Act was enacted, this Court recognized that negligence under the Jones Act and unseaworthiness under general maritime law are

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[6] *See, e.g.*, *Miller*, 989 F.2d at 1457; *Wildman* v. *Burlington N. R.R. Co.*, 825 F.2d 1392, 1395 (9th Cir. 1987) ("[P]unitive damages are unavailable under the FELA."); *Kozar* v. *Chesapeake & O. Ry. Co.*, 449 F.2d 1238, 1242-1243 (6th Cir. 1971) (noting that "there is not a single case since the enactment of FELA in 1908 in which punitive damages have been allowed" and holding that "punitive damages are not recoverable under FELA").

simply two paths to *compensation* for the same injury. In *Pacific Steamship Co.* v. *Peterson*, the Court observed: "The right to recover *compensatory damages* under the new rule for injuries caused by negligence"—that is, Jones Act negligence—"is ... an alternative of the right to *recover indemnity* under the old rules on the ground that the injuries were occasioned by unseaworthiness." 278 U.S. at 137-139 (1928) (emphasis added). Whichever cause of action is invoked, the Court added, "there is but a single wrongful invasion of [the seaman's] primary right of bodily safety and but a single legal wrong, for which he is entitled to but one indemnity by way of compensatory damages." *Id.* at 138 (citation omitted).

A contrary rule would contradict the principles this Court followed in *Miles*, *Higginbotham*, and *Moragne*. Congress's judgments about the availability and scope of remedies for seamen who are killed or injured aboard a vessel should be applied to actions based on unseaworthiness because of the Court's respect for its proper constitutional role and the need to maintain a uniform system of maritime law. Allowing punitive damages in unseaworthiness actions would improperly "expand" the remedies that Congress has decided are appropriate when a seaman is injured or killed aboard a vessel. *Miles*, 498 U.S. at 31, 36. It would also "create an unwarranted inconsistency" in admiralty law, where the damages available would differ for the same injury resulting from the same conduct simply based on which liability label was applied. *Id.* at 26, 30, 33.

As the Court explained in *Higginbotham*, where it rejected an argument similar to the one respondent presents here (there, that loss-of-society damages should be available on unseaworthiness claims for passengers on the high seas, even though Congress had

not allowed such damages under DOHSA), "[t]here is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted. In the area covered by the statute, it would be no more appropriate to prescribe a different measure of damages than to prescribe a different statute of limitations, or a different class of beneficiaries." 436 U.S. at 625. Indeed, were the Court to allow punitive damages for seamen in unseaworthiness cases, it would not be just rewriting the Jones Act's rules on damages; it would be essentially eliminating the Jones Act altogether. If punitive damages were available for unseaworthiness claims but not Jones Act claims, the Jones Act negligence cause of action would fall quickly into desuetude. In articulating the scope of recovery in unseaworthiness cases, the Court should follow "a process of accommodation with [congressional] statutes, not their abrupt and near-total forced [o]bsolescence." *Sea-Land Servs., Inc.* v. *Gaudet*, 414 U.S. 573, 602 (1974) (Powell, J., dissenting).

B. *Townsend*'s Holding That Punitive Damages Are Available In Maintenance And Cure Actions Does Not Control This Case

Notwithstanding this Court's conclusion in *Miles* that the scope of recovery in unseaworthiness cases should not exceed the remedies available under the Jones Act, the court of appeals believed that this case was controlled by *Townsend*, which held that punitive damages are available for the willful refusal to provide maintenance and cure. The court of appeals read *Townsend* to have adopted a broad presumption that punitive damages are available in actions under general maritime law unless there is clear congressional intent to bar punitive damages, and to have found that the

Jones Act does not express such an intent. That conclusion ignores the unanimous "reasoning" of *Miles*, which, this Court emphasized in *Townsend*, "remains sound." 557 U.S. at 420.

The appellate court's fundamental error was not apprehending two distinctive features of the doctrine of unseaworthiness, which make clear that the framework of *Miles*, not *Townsend*, governs this case. First, unseaworthiness is an alternative cause of action to Jones Act negligence; maintenance and cure is not. Second, the modern cause of action for unseaworthiness—a broad strict-liability regime—was created by the courts after the Jones Act's enactment, whereas the duty to provide maintenance and cure dates back centuries. Because of those differences, the dual imperatives of judicial respect for Congress's judgments and uniformity in maritime law have much more force with respect to unseaworthiness actions.

1. As this Court has recognized repeatedly since the Jones Act was enacted, unseaworthiness and Jones Act negligence are "alternative ... right[s]" to recover for the same injury caused by the same accident. Whichever is invoked, "there is but a single wrongful invasion of [the seaman's] primary right of bodily safety and but a single legal wrong for which he is entitled to but one indemnity by way of compensatory damages." *Peterson*, 278 U.S. at 138-139 (citation omitted); *see McAllister*, 357 U.S. at 225 (unseaworthiness and Jones Act negligence are "alternative 'grounds' of recovery for a single cause of action"); *Townsend*, 557 U.S. at 424 ("the seaman may have ... one of the ... two": unseaworthiness or Jones Act negligence (quotation marks omitted)); Gilmore & Black, *The Law of Admiralty* 383 (2d ed. 1975) ("The Jones Act count and

the unseaworthiness count ... derive from the same accident and look toward the same recovery.").

That is not true of maintenance and cure, which has different origins. Unlike unseaworthiness, "the maintenance and cure right is 'in no sense ... an alternative of[] the right to recover compensatory damages' under the Jones Act," and thus "the seaman may have maintenance and cure *and* also one of the other two"—a recovery for Jones Act negligence or unseaworthiness. *Townsend*, 557 U.S. at 423-424 (quoting *Peterson*, 278 U.S. at 138 and Gilmore & Black, *supra*, at 281) (emphasis added; quotation marks omitted).

Maintenance and cure is not an "indemnity" for an injury suffered by a seaman attributable to a wrong by the vessel owner or operator, as the Court has referred to the action for unseaworthiness. *See Peterson*, 278 U.S. at 138. It "does not rest upon negligence or culpability on the part of the owner or master, nor is it restricted to those cases where the seaman's employment is the cause of the injury or illness." *Calmar*, 303 U.S. at 527 (citations omitted). Further, "[i]t is not an award of compensation for the disability suffered." *Id.* at 528. Rather, it is an obligation of support running from the vessel owner to the seaman whenever the mariner is hurt or becomes ill, whatever its cause: "[T]he shipowner is liable for any injury which occurs or any illness which manifests itself while the seaman is under articles." Gilmore & Black, *supra*, at 281.

These points make clear that remedies for unseaworthiness should be governed by the principles of deference to congressional policy decisions and uniformity in maritime law that were outlined in *Miles*, *Higginbotham*, and *Moragne*, rather than the Court's decision on maintenance and cure in *Townsend*. Fashioning

remedies for an unseaworthiness claim directly implicates Congress's judgments in the Jones Act in a way that remedies for a claim for maintenance and cure do not.

To be sure, in distinguishing *Miles*, the Court in *Townsend* noted that *Miles* had not involved a request for punitive damages. *See Townsend*, 557 U.S. at 420. But the Court did not focus on the type of damages sought divorced from the underlying cause of action. Rather, what mattered, the Court said, was that "unlike the facts presented by *Miles*, the Jones Act does not address maintenance and cure or *its* remedy." *Id.* (emphasis added).

The Jones Act, by contrast, most certainly does address unseaworthiness and its remedies, as *Miles* made plain. Indeed, the Jones Act was enacted to resolve many of the principal deficiencies in unseaworthiness doctrine as it had developed in the late nineteenth century, which had left many seamen without a reliable remedy for injuries sustained aboard a vessel. *See* pp. 5-7, *supra*. In the Jones Act, Congress left untouched the federal courts' admiralty authority to develop the law concerning remedies for the failure to provide maintenance and cure. But quite the opposite is true for unseaworthiness, as to which Congress said, "[T]his much and no more," and "[a]n admiralty court is not free to go beyond those limits." *Miles*, 498 U.S. at 24.

2. The modern strict-liability cause of action for unseaworthiness emerged only in the 1940s, well after Congress expressed its judgments about the scope of recovery for injured seamen in the Jones Act. Although some cases, including *The Osceola*, had recognized damages claims for unseaworthiness before the Jones Act was enacted, the doctrine of unseaworthiness

experienced a "revolution" after passage of that law, in which unseaworthiness was "transformed ... into a strict liability obligation" (without a fellow-servant defense). *Miles*, 498 U.S. at 25. Because of that "radical change," unseaworthiness went from an "obscure and relatively little used" cause of action to "the principal vehicle for recovery by seamen for injury or death." *Id.* at 25-26 (quotation marks omitted).

That history again marks unseaworthiness as quite different from maintenance and cure, taking this case outside the analytical framework the Court followed in *Townsend*. In *Townsend*, the Court noted that punitive damages had been awarded before the Jones Act for some maritime torts, just as they had been awarded for similar torts on land. *See* 557 U.S. at 411-412 (discussing punitive damages on claims for false arrest, trespass, assault, and illegal capture). The Court also noted that two cases predating the Jones Act had awarded punitive damages for the vessel owner's willful failure to provide maintenance and cure. *See id.* at 414 (discussing *The City of Carlisle*, 39 F. 807 (D. Or. 1889), and *The Troop*, 118 F. 769 (D. Wash. 1902), *aff'd*, 128 F. 856 (9th Cir. 1904)). And in distinguishing *Miles*, the Court stressed that the contours of the cause of action for maintenance and cure "were well established before the passage of the Jones Act." *Id.* at 420.

Unlike unseaworthiness, maintenance and cure did not undergo a post-Jones Act revolution at all, let alone one that made it an attractive alternative for Jones Act negligence. Rather, "the legal obligation to provide maintenance and cure dates back centuries." *Townsend*, 557 U.S. at 413; *see also Calmar*, 303 U.S. at 527 (duty of maintenance and cure is "ancient"). Allowing punitive damages in actions for maintenance and cure therefore does not present the risk of the Court's ex-

ceeding its constitutional role by displacing Congress's judgment about the scope of recovery for a seaman's injury or death caused by an accident.

Judicial recognition of punitive damages in unseaworthiness actions would improperly displace Congress's judgment about the scope of remedies for a seaman's injury sustained in the course of his employment. As detailed below, there is no history of punitive damages being allowed in unseaworthiness actions before the Jones Act. *See* pp. 30-33, *infra*. But in any event, allowing punitive damages in such actions would render Congress's decision to bar them in parallel Jones Act negligence actions "'meaningless.'" *Miles*, 498 U.S. at 31 (quoting *Higginbotham*, 436 U.S. at 625). The same cannot be said of allowing punitive damages in maintenance and cure actions.

C. The Framework Of *Miles* Applies Fully To Cases Involving Personal Injury And Punitive Damages

The facts of *Miles* involved claims for loss of society and lost future earnings as a remedy for a seaman's wrongful death. The court of appeals and respondent have suggested that the concerns of uniformity and deference to congressional judgments emphasized in that decision have less application to cases like this one, either because the plaintiff here was injured but not killed, or because punitive damages are supposedly not implicated by the limitation of compensatory damages to pecuniary loss that Congress enacted in FELA and the Jones Act. Neither argument has merit.

1. *Miles* cannot be distinguished on the ground that it involved a claim for wrongful death rather than personal injuries. Unseaworthiness and Jones Act neg-

ligence are alternative remedies for the same incident, regardless of the resulting condition of the seaman. As the Court recognized in *Miles*, "the Jones Act provides an action in negligence for the *death or injury* of a seaman." *Miles*, 498 U.S. at 29 (emphasis added); *see* 46 U.S.C. § 30104 ("seaman injured ... or if the seaman dies"). The doctrine of unseaworthiness likewise provides a remedy for both personal injuries and wrongful death. *See* pp. 2-7, *supra*. Judicial expansion of the remedies for unseaworthiness beyond those for Jones Act negligence therefore creates legal inconsistency and oversteps the limits Congress has set, whether or not the seaman dies from the accident. Indeed, although *Miles* involved a wrongful-death claim, the Court indicated its awareness that the principles underlying its analysis applied equally to personal-injury claims: "We will not create, under our admiralty powers, a remedy ... that goes well beyond the limits of Congress' ordered system of recovery for seamen's *injury and death*." 498 U.S. at 36 (emphasis added).

It does not matter that the FELA/Jones Act bar on compensatory damages for non-pecuniary harms may apply only in wrongful-death actions, and not personal-injury cases.[7] That difference is simply a function of the scope of damages under those statutes, and stems from certain idiosyncrasies relating to the way in which courts determined what constituted a compensable loss for personal injuries, as opposed to wrongful death.

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[7] *See Michigan Cent. R.R. Co.* v. *Vreeland*, 227 U.S. 59, 65 (1913) (suggesting that, under FELA, the employee's suffering may be compensable in personal-injury actions, even though only pecuniary loss is compensable in wrongful-death actions); *Consolidated Rail Corp.* v. *Gottshall*, 512 U.S. 532, 549-550 (1994) ("damages for negligent infliction of emotional distress are cognizable under FELA").

See, e.g., *Miles*, 498 U.S. at 32; *Michigan Cent. R.R. Co.* v. *Vreeland*, 227 U.S. 59, 65, 68 (1913). That the particular damages limitation at issue in *Miles* applies only in wrongful-death actions does not diminish the more fundamental lesson of *Miles* that FELA/Jones Act damages limitations constrain the scope of recovery in unseaworthiness actions.

And as noted above, the courts have consistently recognized that punitive damages are not available under FELA and the Jones Act at all. *See pp.*17-19 & n.6, *supra*. Indeed, this Court and the circuit courts have specifically acknowledged that the scope of recovery under FELA and the Jones Act is limited to compensation for loss even in personal-injury actions. *See St. Louis*, 237 U.S. at 656 (FELA "invests the injured employee ... with a right to such damages as will be reasonably compensatory for the loss"); *Vreeland*, 227 U.S. at 65, 69-71 (under FELA, "[i]f [employee] had survived he might have recovered such damages as would have compensated him for his expense, loss of time, suffering, and diminished earning power."); *McBride*, 768 F.3d at 388 ("No case under FELA has allowed punitive damages, whether for personal injury or death" and "no cases have awarded punitive damages under the Jones Act."); *Kopczynski*, 742 F.2d at 560-561 (Jones Act); *see also Townsend*, 557 U.S. at 428 (Alito, J., dissenting)). Given that uniform case law, *Miles*'s reasoning requires the same result in all unseaworthiness actions, whether for personal injury or for wrongful death.

The contrary position—allowing seamen to recover punitive damages for personal injuries but not wrongful death—has little to recommend it. As the Jones Act explicitly recognizes, seamen do not die from accidents spontaneously; they "die[] *from the injury*." 46 U.S.C.

§ 30104. Sometimes, a substantial amount of time will elapse between the injury and the resulting death. A plaintiff's entitlement to punitive damages, and a defendant's liability for them, should not depend on the vagaries of whether an injury eventually results in the seaman's death. It makes even less sense that a seaman's death—the more serious outcome—would *terminate* the potential for punitive damages that would be available for his personal injuries. Adopting that position would return maritime law to a regime in which actions for wrongful death are afforded more limited remedies than those for personal injury—a distinction that was "unjustified in reason" or "public policy." *Moragne*, 398 U.S. at 378-379, 381-383, 388-390, 405.

2. Nor can *Miles* be distinguished, as the court of appeals thought, on the ground that it only addressed which types of compensatory damages are available. *See* Pet. App. 12a-15a. The rationale of *Miles* is not so narrow. It makes no sense to read *Miles* to mean that the Jones Act's damages limitations apply only with respect to a very narrow category of damages—compensatory damages for non-pecuniary loss—but otherwise leave the courts free to develop other remedies in unseaworthiness actions, including punitive damages.

The principles that drove the Court's decision in *Miles* have equal force beyond the narrow question whether damages are available for non-pecuniary harms. Indeed, in *Miles* itself, the Court applied those principles to conclude that the Jones Act precluded a type of compensatory damages for *pecuniary* loss: lost future income in a survival suit. *See* 498 U.S. at 34-36. Thus, *Miles* recognized that these principles have general application to unseaworthiness actions, and nothing suggests that they suddenly recede when punitive

damages are sought. The Jones Act expresses Congress's judgment about punitive damages as well, and so, under *Miles*, the courts must equally respect that judgment.

II. Even If This Court Were Not Constrained By Congress's Judgments, It Should Not Allow Punitive Damages In Unseaworthiness Actions

Even if the Court were not constrained by Congress's judgments about appropriate remedies, it should still conclude that punitive damages are not available in unseaworthiness actions. In considering whether to exercise its admiralty powers to authorize punitive damages in unseaworthiness cases, the Court should consider, as it did in *Townsend*, whether there is "evidence that claims for [unseaworthiness] were excluded from th[e] general admiralty rule" allowing punitive damages, and whether "Congress has enacted legislation departing from this common-law understanding." 557 U.S. at 414-415. And the Court should consider the adverse consequences for maritime commerce and national security of allowing punitive damages, which have long been criticized for their potential for overdeterrence. All those factors counsel against allowing punitive damages for unseaworthiness.

A. There Is No Established History Of Punitive Damages In Unseaworthiness Actions

In *Townsend*, the Court observed that, even before Congress passed the Jones Act, admiralty courts had awarded punitive damages for a variety of maritime torts that were analogous to land-based torts, and had also awarded punitive damages when a seaman was maliciously denied his right to maintenance and cure. *See* 557 U.S. at 411-414. Here, by contrast, there is no

established pre-Jones Act history of punitive damages being awarded in unseaworthiness actions. That is hardly surprising, given that the cause of action for unseaworthiness as it exists today—a strict-liability tort—did not take shape until after the Jones Act was enacted, and unseaworthiness as a tort cause of action did not emerge at all until the end of the nineteenth century (unlike maintenance and cure, which arose as a cause of action long earlier). *See* pp. 7-8, *supra*.

None of the decisions respondent has cited (Br. Opp. 16-17 & n.6) is to the contrary. *The Rolph* was a post-Jones Act case that awarded damages as "compensation" for the injured seaman without mentioning punitive damages or otherwise indicating that punitive damages were available. 293 F. 269, 271-272 (N.D. Cal. 1923), *aff'd*, 299 F. 52 (9th Cir. 1924); *see Townsend*, 557 U.S. at 431 (Alito, J., dissenting). As this Court noted in *Townsend*, the damages awarded in *The City of Carlisle*, 39 F. 807, and *The Troop*, 118 F. 769, insofar as they had "some punitive element," were based on the breach of the duty of maintenance and cure, not unseaworthiness. 557 U.S. at 414; *see The City of Carlisle*, 39 F. at 816-817 ("damages for the gross neglect and mistreatment [the seaman] received after the injury"); *The Troop*, 118 F. at 770-773 (damages for "captain's malpractice" with respect to treatment of seaman's injuries).[8]

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[8] In *Townsend*, the Court also cited an article surveying the award of punitive damages in admiralty. 557 U.S. at 412 (citing Robertson, *Punitive Damages in American Maritime Law*, 28 J. Mar. L. & Comm. 73, 115 (1997)). That article provides not a single example of an award of punitive damages for unseaworthiness claims prior to enactment of the Jones Act.

Thus, unlike in *Townsend*, where the Court would have had to conclude that the Jones Act took away a pre-existing remedy of punitive damages to rule for the shipowner in that case, the same is not true here; there was no remedy of punitive damages for unseaworthiness claims before 1920. Unlike *Townsend* itself, therefore, this case does not implicate the Court's observation that the Jones Act "did not eliminate pre-existing remedies to seamen." 557 U.S. at 415-416. Before 1920, seamen did not have the remedy of punitive damages in unseaworthiness cases, and so there was nothing for Congress to take away.

By contrast, Congress has clearly indicated its intent to reject any common-law rule that would allow punitive damages for a breach of the duty of unseaworthiness. Specifically, Congress enacted the Jones Act to provide a remedy for a seaman's accidental injury or death suffered while employed aboard a vessel. *See, e.g., Moragne*, 398 U.S. at 397-398. In doing so Congress limited the scope of recovery to compensatory damages, disallowing punitive damages. *See* pp. 5-7, *supra*.

Only a few appellate cases have ever recognized the availability of punitive damages in unseaworthiness actions, and all were decided in the 1970s and 1980s—decades after the Court's reinvigoration of unseaworthiness in *Mahnich*.[9] In none of those cases did the court identify a "tradition" of punitive damages in unseaworthiness actions, *Townsend*, 557 U.S. at 414-415,

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[9] *See Evich* v. *Morris*, 819 F.2d 256, 258 (9th Cir. 1987); *Self* v. *Great Lakes Dredge & Dock Co.*, 832 F.2d 1540, 1550 (11th Cir. 1987); *Complaint of Merry Shipping, Inc.*, 650 F.2d 622, 625 (5th Cir. 1981); *In re Marine Sulphur Queen*, 460 F.2d 89, 105 (2d Cir. 1972) (dicta).

or grapple with the special relationship between unseaworthiness and Jones Act negligence that gives force to the constitutional imperatives endorsed in *Miles*. *See McBride*, 768 F.3d at 395-401 (Clement, J., concurring).

Moreover, this post-enactment era of punitive damages in unseaworthiness actions passed swiftly. As appellate courts consistently concluded, this Court's 1990 decision in *Miles* effectively overruled those cases and foreclosed punitive damages for unseaworthiness.[10] Not until the Washington Supreme Court's 2017 decision in *Tabingo* v. *American Triumph LLC*, 391 P.3d 434 (Wash. 2017), *cert. denied*, 138 S. Ct. 648 (2018), were punitive damages recognized again in unseaworthiness actions. In sum, the late, ephemeral period in which a few lower courts issued poorly reasoned opinions allowing punitive damages in unseaworthiness actions does not establish the kind of historical recognition that the Court identified in *Townsend*. *Cf.* 557 U.S. at 414.

B. Allowing Punitive Damages In Unseaworthiness Actions Could Have Serious Adverse Consequences

Finally, to the extent the Court believes it remains free as an admiralty court to decide whether to authorize punitive damages in unseaworthiness cases—

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[10] *Guevara* v. *Maritime Overseas Corp.*, 59 F.3d 1496, 1507 (5th Cir. 1995), *abrogated on other grounds by Townsend*, 557 U.S. 404; *see also McBride*, 768 F.3d at 388-389 (plurality); *Horsley* v. *Mobil Oil Corp.*, 15 F.3d 200, 203 (1st Cir. 1994); *Miller*, 989 F.2d at 1455, 1457-1459; *Wahlstrom* v. *Kawasaki Heavy Indus. Ltd.*, 4 F.3d 1084, 1094 (2d Cir. 1993); *Penrod Drilling Corp.* v. *Williams*, 868 S.W.2d 294, 296-297 (Tex. 1993); *Sky Cruises Ltd.* v. *Andersen*, 592 So. 2d 756, 756 (Fla. Dist. Ct. App. 1992) (per curiam).

notwithstanding Congress's expressed policy judgment against such damages in the Jones Act and the lack of historical practice supporting such damages—the Court should give substantial weight to the adverse consequences of punitive damages for maritime commerce, the environment, and national security. Exposing commercial maritime operators to the risk of punitive damages would subject them to significantly increased costs—costs likely to reverberate across the many aspects of American society that depend on maritime commerce.

1. Punitive damages have long been criticized because they induce potential defendants "to spend more to prevent the activity that causes the ... harm ... than the cost of the harm itself." *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 593 (1996) (Breyer, J., concurring). Such "overdeterrence" occurs because firms take socially wasteful precautions or decline to engage in socially valuable commercial activity altogether. Polinsky & Shavell, *Punitive Damages: An Economic Analysis*, 111 Harv. L. Rev. 869, 882-883 & n.29 (1998). The problem of overdeterrence is often exacerbated by "the stark unpredictability of punitive awards." *Exxon Shipping Co.* v. *Baker*, 554 U.S. 471, 494-501 (2008); *see* Schwartz, *Deterrence and Punishment in the Common Law of Punitive Damages: A Comment*, 56 S. Cal. L. Rev. 133, 145 & n.60 (1982); Sunstein et al., *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 Yale L.J. 2071, 2078 (1998); Stier, *Jackpot Justice: Verdict Variability and the Mass Tort Class Action*, 80 Temp. L. Rev. 1013, 1022-1023 (2007).[11]

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[11] The risk of overdeterrence may be lessened where tortfeasors are likely to escape liability, *see Exxon Shipping Co.* v.

Overdeterrence through punitive damages is particularly likely in this context because, unlike in many other tort contexts, unseaworthiness exposes owners and operators of vessels to criminal liability—already a strong deterrent. 46 U.S.C. § 10908; *see* Sunstein et al., 107 Yale L.J. at 2084. And the need to avoid overdeterrence is great in the strict-liability regime of unseaworthiness, which does not serve a "punitive or deterrent purpose"; "[w]hen our law imposes strict liability, it often accompanies this with limitations, not existing in the case of liability based on fault, as to amount, as to persons benefited, or as to both." *Igneri* v. *Cie. de Transports Oceaniques*, 323 F.2d 257, 268 (2d Cir. 1963) (Friendly, J.).

Those costs and inefficiencies would be particularly salient in unseaworthiness cases. Because unseaworthiness is a strict-liability regime, in which fault need not be proved, it is comparatively easy for a plaintiff to survive dispositive pretrial motions and then prevail at trial. The threat of punitive damages will therefore have an *in terrorem* effect on unseaworthiness defendants, pressuring them to settle weaker cases or to settle for more money than they otherwise would.[12] That

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Baker, 554 U.S. at 494; Polinsky & Shavell, 111 Harv. L. Rev. at 888, but that is not likely to be the case generally in personal-injury actions based on unseaworthiness. The owner or operator will usually be known, the harm will likely have "occurred openly," and "the magnitude of the harm is such that the victims almost surely will bring suit." Polinsky & Shavell, 111 Harv. L. Rev. at 891; *see* Sunstein et al., 107 Yale L.J. at 2076.

[12] *See, e.g.*, Henderson, *The Impropriety of Punitive Damages in Mass Torts*, 52 Ga. L. Rev. 719, 747 (2018) ("[T]he risk of suffering a crushing punitive damages penalty gives rise to so-called 'blackmail settlements' in which defendants pay more than the relevant mass tort claims are reasonably worth."); Sales & Cole, *Punitive Damages: A Relic That Has Outlived Its Origins*, 37

dynamic would be "particularly strong," Seamon, *An Erie Obstacle to State Tort Reform*, 43 Idaho L. Rev. 37, 89-90 (2006), because unseaworthiness defendants would have to pay out of pocket; liability insurers ordinarily exclude punitive damages from policy coverage.[13]

Vand. L. Rev. 1117, 1156 (1984) (describing "the now universal practice of plaintiffs alleging and demanding punitive damages in an effort ... to compel defendants to settle meritless cases because of the fear that a jury will return an outrageous punitive damage award"); Scheuerman, *Two Worlds Collide: How the Supreme Court's Recent Punitive Damages Decisions Affect Class Actions*, 60 Baylor L. Rev. 880, 916 (2008) (when a case "includes a claim for punitive damages claim, the combined settlement pressure increases exponentially"); Berch & Berch, *An Essay Regarding* Gasperini v. Center for Humanities, Inc. *and the Demise of the Uniform Application of the Federal Rules of Civil Procedure*, 69 Miss. L.J. 715, 727 n.49 (1999) (describing "the concomitant increase in the settlement value of a case once a claim for punitive damages is added"); Maskin, *Litigating Claims for Punitive Damages: The View from the Front Line*, 31 Loy. L.A. L. Rev. 489 (1998) ("[T]here is no doubt that the possibility of an extraordinary punitive damages award influences the dynamics of personal-injury litigation by increasing plaintiffs' opportunities and defendants' exposure."); Polinsky, *Are Punitive Damages Really Insignificant, Predictable, and Rational? A Comment on Eisenberg et al.*, 26 J. Legal Stud. 663, 666-669 (1997) (explaining why studies looking only at the effects of punitive damages on trial outcomes alone are likely to "substantially understate the impact of punitive damages on settlements"); Koenig, *The Shadow Effect of Punitive Damages on Settlements*, 1998 Wis. L. Rev. 169, 172, 176-177 & n.25 (1998) (concluding based on hundreds of interviews with lawyers that the perceived risk of large and unpredictable punitive damages awards "plays a significant role in driving settlements").

[13] *See, e.g.*, Brown, *Marine Insurance for Punitive Damages* (2014), https://www.ajg.com/media/1615159/marine-insurance-for-punitive-damages.pdf (explaining that "[t]he marine market has traditionally excluded coverage [of] punitive damages specifically in marine liability policies," but noting that some insurers "reluctant[ly]" have begun to extend such coverage to large accounts in

2. By thus raising operating costs unjustifiably, recognition of punitive damages in unseaworthiness actions would create "a devastating potential for harm," *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 42 (1991) (O'Connor, J., dissenting), in an industry that "is vital to both the national defense and the commercial welfare of our country," *Independent U.S. Tanker Owners Comm.* v. *Lewis*, 690 F.2d 908, 911 (D.C. Cir. 1982), and that provides an environmentally advantageous means of transportation.[14]

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response to American court decisions); Ray, *Punitive Damages Under Protection & Indemnity and Maritime Employer's Liability Policies* (Oct. 31, 2011), http://insurancethoughtleadership.com/punitive-damages-under-protection-indemnity-and-maritime-employers-liabilit ("[P]unitive damages typically are not covered under Protection and Indemnity (P&I) or Maritime Employers Liability (MEL) policies.... We are not aware of any U.S. Protection and Indemnity or Maritime Employer's Liability insurance products that do not have an exclusion for punitive damages."); *see also* Widiss, *Liability Insurance Coverage for Punitive Damages? Discerning Answers to the Conundrum Created by Disputes Involving Conflicting Public Policies, Pragmatic Considerations and Political Actions*, 39 Vill. L. Rev. 455, 460-468 (1994) (explaining the many reasons why liability insurance policies are frequently construed to exclude punitive damages).

[14] *See, e.g.*, Navy League of the United States, *America's Maritime Industry: The Foundation of American Seapower* 4, 7-8, 11, 14-15, https://www.navyleague.org/file/programs/Maritime-Policy-Statement-Report.pdf; Texas Transportation Institute, Center for Ports and Waterways, *A Modal Comparison of Domestic Freight Transportation Effects on the General Public* 34, 38 (2007), https://www.maritime.dot.gov/sites/marad.dot.gov/files/docs/resources/3746/phaseiireportfinal121907.pdf (comparing the energy efficiencies and emissions generated by highway, railroad, and maritime transport, and finding maritime transport to be consistently more energy-efficient and to generate fewer emissions).

The nation's commercial maritime fleet comprises more than 40,000 vessels, which transport about 100 million passengers annually, as well as every conceivable type of raw material and consumer good.[15] In 2009 alone, U.S. marine vessels transported $1 trillion worth of imports and exports.[16] A robust domestic maritime industry also facilities American military readiness and strength.[17] United States commercial vessels transport our servicemembers and their supplies around the world, including 95% of the dry cargoes to U.S. and Coalition Forces in Iraq and Afghanistan since 2008.[18]

The maritime industry has achieved those levels of integration into U.S. commerce and national security under a legal regime in which owners and operators have largely been free from the specter of punitive damages in connection with injury or death caused by a ship's unseaworthiness. The maritime industry's ability to perform its vital and varied roles would be jeopardized by the recognition of punitive damages in unseaworthiness actions.

The increased operating costs that would occur under such a regime would likely "be eventually passed along to consumers," whether private or governmental. *McBride*, 768 F.3d at 401 (Clement, J., concurring); *see also, e.g., In re Korean Air Lines Disaster of Sept. 1, 1983*, 932 F.2d 1475, 1490 (D.C. Cir. 1991) ("The award

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[15] American Maritime Partnership, *Frequently Asked Questions*, https://www.americanmaritimepartnership.com/faq/; *The Foundation of American Seapower*, *supra* n.14, 7-8, 14.

[16] *The Foundation of American Seapower*, *supra* n.14, at 12-13.

[17] *Id.* at 16-18.

[18] *Id.* at 16-17.

of punitive damages ... would increase the amount of litigation, the cost of insurance, and ultimately the price of air transportation."); Polinsky & Shavell, 111 Harv. L. Rev. at 952 ("To cover the added cost of punitive damages, firms will tend to raise their prices, which will cause the welfare of their customers to decline."). Faced with higher prices, consumers might choose to buy less, and manufacturers, distributors, and exporters may shift to other modes of transportation that are less cost effective and more damaging to the environment. Similarly, military spending could increase or readiness could decrease.

Moreover, recognition of punitive damages in unseaworthiness actions would prejudice U.S. maritime actors in international commerce, given that "punitive damages overall are higher and more frequent in the United States than they are anywhere else." *Baker*, 554 U.S. at 496-497; *see also* Gotanda, *Charting Developments Concerning Punitive Damages: Is the Tide Changing?*, 45 Colum. J. Transnat'l L. 507, 508 (2007) ("American awards dwarf what is allowable in [other common law] countries."). In fact, many other countries—including three of the United States' top four trading partners (China, Mexico, Japan, and Germany)—do not recognize punitive damages in maritime actions at all. *See, e.g.*, Johnson, *Punitive Damages, Chinese Tort Law, and the American Experience*, 9 Frontiers L. China 321, 321-324 (2014); Duff, Comment, *Punitive Damages in Maritime Torts: Examining Shipowners' Punitive Damage Liability in the Wake of the* Exxon Valdez *Decision*, 39 Seton Hall L. Rev. 955, 973-974 (2009); Davies & Hayden, *Global Issues in Tort Law* 12 (2008); Liptak, *Foreign Courts Wary of U.S. Punitive Damages*, N.Y. Times, Mar. 26, 2008 ("Most of

the rest of the world views the idea of punitive damages with alarm."); *see also* ASPA Cert. Br. 7-10.

In light of these serious adverse consequences, there is no good reason for the Court to drastically change the strict-liability cause of action of unseaworthiness, at this late date, from a mechanism by which seamen may obtain fair compensation for their injuries to a punitive measure. Doing so would wrest unseaworthiness from its historical origins, divorce it from the Jones Act negligence cause of action to which it has been closely paired for decades, and unsettle the legal regime that has allowed American maritime commerce to thrive.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

BARRY W. PONTICELLO
RENEE C. ST. CLAIR
ENGLAND, PONTICELLO & ST. CLAIR
701 B. Street Suite 1790
San Diego, CA 92101
(619) 225-6450
bponticello@eps-law.com

SETH P. WAXMAN
Counsel of Record
PAUL R. Q. WOLFSON
DAVID M. LEHN
CHRISTOPHER ASTA
EDWARD WILLIAMS
DREW VAN DENOVER*
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
seth.waxman@wilmerhale.com

**Admitted to practice only in California. Supervised by members of the District of Columbia bar.*

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